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February 3, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: September 10, 2008

Case Number: TSO-0668

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (the Individual) to retain his access authorization.^{1/} The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored.^{2/} For the reason detailed below, I find that the Individual's access authorization should not be restored.

I. Background

This administrative review proceeding began when a Local Security Office (LSO) of the Department of Energy (DOE) suspended the Individual's access authorization based upon derogatory information in its possession that created substantial doubt pertaining to his continued eligibility. In accordance with 10 C.F.R. § 710.21, the LSO subsequently issued a Notification Letter that included a statement of the derogatory information causing the security concern under 10 C.F.R. § 710.8(f) and (l) (Criterion F and Criterion L).

^{1/} Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

^{2/} Access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5(a).

The derogatory information supporting the Criterion F^{3/} security concern states that the Individual falsified and omitted information from a Questionnaire for National Security Positions (QNSP) in July 2006. The Notification Letter claims that the Individual deliberately falsified a question on the QNSP when he claimed that he had never had a lien placed against his property; a lien was placed against the Individual's property for failure to pay state taxes in 2003 and 2004. In addition, the Notification Letter claims that the Individual deliberately omitted from the QNSP that his wages had been garnished for failing to file and pay his state income taxes. Further derogatory information supporting the Criterion F security concern states that the Individual falsified information on a Personnel Security Questionnaire (PSQ) in September 1986. The Notification Letter claims that the Individual deliberately omitted from his 1986 PSQ that he had been terminated from employment because of his alcohol use. In addition, the Notification Letter claims that the Individual deliberately omitted from his PSQ that he had used marijuana in 1984. The final derogatory information supporting the Criterion F security concern states that the Individual falsified information during a Personnel Security Interview in March 2002. The Notification Letter states that the Individual made false statements during the March 2002 PSI when he stated that he intended to contact a tax lawyer to assist him in filing his state and federal income taxes. The Notification Letter states that he never filed his state and federal income taxes.

The derogatory information supporting Criterion L^{4/} security concern cited in the Notification Letter also involves the Individual's failure to file his federal and state taxes. The Notification Letter indicates that at the May 2008 PSI the Individual admitted he had not filed his tax returns since 1997. He acknowledged that he knew he was in violation of the law by not filing his tax returns. Also at the May 2008 PSI, he admitted that he considered himself to be financially irresponsible because he had not filed his tax returns.

The Notification Letter informed the Individual that he was entitled to a hearing before a Hearing Officer in order to respond to the information contained in that letter. Upon receipt of the Notification Letter, the Individual requested a hearing, and that request was

^{3/} Criterion F refers to information indicating that an individual "deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, a personnel qualifications statement, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization." 10 C.F.R. § 710.8(f).

^{4/} Criterion L refers to information indicating that the Individual has "engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy." *Id.* at § 710.8(l).

forwarded to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.^{5/}

At the hearing, the Individual was represented by an attorney. He testified on his own behalf and presented the testimony of his tax attorney and three co-workers. The Individual's attorney entered three exhibits into the record.^{6/} The DOE counsel presented no witnesses. The DOE counsel entered 10 exhibits into the record.

II. The Hearing Testimony

A. The Individual

The Individual testified that he was married at age 17. Tr. at 65. He stated that prior to his marriage, he did not have a job. Tr. at 65. Since he did not have a job prior to his marriage, he had not filed a tax return. Tr. at 66. During his marriage, his wife filed the tax returns and handled all the family's paperwork. Tr. at 66. When he and his wife divorced in 1997, over his alcohol use, he chose not to file because it was easier. Tr. at 67.

The Individual testified that he has been sober since September 18, 2001. Tr. at 67. After he stopped consuming alcohol, he intended to file his taxes, but he procrastinated. Tr. at 68. "I thought it would be a monumental task to go through the mountains of paperwork that I had stashed, rat-holed. . . . I despise paperwork. I do the absolute minimum." Tr. at 68.

The Individual testified that he will do whatever is necessary to pay his tax debt. Tr. at 70. His alimony requirements to his wife will cease in three years. Tr. at 70. He has voluntarily assumed his son's educational debt, and his ex-wife has indicated that she may assume that debt from him. Tr. at 70. He believes that he can find a second job. Tr. at 72.

The Individual testified that he did not intend to falsify information on the QNSP. Tr. at 64. He testified that his wages were not being garnished for tax purposes when he completed the QNSP and he forgot about the previous garnishments. Tr. at 63. He stated at the hearing that he was unaware of a lien against his property. Tr. at 60.

^{5/} 10 C.F.R. § 710.25(g).

^{6/} At the hearing, the Individual's attorney asked for additional time in which to file the third exhibit. I granted the additional time and the final exhibit was received by this office on December 12, 2008, the same day the transcript of the hearing was received. The record was closed on that day.

The Individual testified he has now filed his federal and state tax returns. Tr. at 69. He stated that he remembered the conversation in 2002 in which he stated that he intended to contact a lawyer about his past due taxes. He testified, "I was paralyzed by fear, and I was clean and sober, but I was beginning to come out of the fog after 20-some years of drinking, and still I intended to, but I just couldn't get myself to make the moves to do it." Tr. at 68.

B. Tax Attorney

The tax attorney testified that he is also a Certified Public Accountant (CPA). He has been an attorney for 25 years and a CPA for 30 years. Tr. at 20. He stated that he recently assisted the Individual with filing his 1998 through 2007 tax returns. Tr. at 19, 21. He testified that he finalized the tax returns, confirmed that the Individual had signed the forms, and placed them in the mail. Tr. at 21. The tax attorney testified that the Individual's tax debt is approximately \$45,000, before penalty or interest. Tr. at 25. The tax attorney, who testified that he once worked for the Internal Revenue Service, expects the Individual to be placed on a monthly payment plan in order to meet his tax debt. Tr. at 23. At the hearing, the tax attorney testified that he has not yet heard from either the federal or state tax authorities regarding the Individual's tax burden, but he is convinced that both authorities have received the tax returns. Tr. at 21, 24. At this point in the hearing, the DOE counsel stipulated to the fact that the Individual had recently completed and filed his 1998 through 2007 tax returns. Tr. at 25.

C. First Co-Worker

The first co-worker indicated that he has known the Individual for approximately 10 years. Tr. at 29. They have no social interaction. Tr. at 31. The first co-worker finds the Individual to be completely trustworthy, reasonable, and forthright. Tr. at 31. The Individual has completely met the first co-worker's expectations and standards. Tr. at 32. "I think [the Individual's] performance is consistent with the culture and the operating procedures [at DOE]." Tr. at 37.

D. Second Co-Worker

The second co-worker testified that he has known the Individual for 18 years. Tr. at 44. He has no social relationship with the Individual. Tr. at 45. He works with the Individual frequently. Tr. at 45. The second co-worker finds the Individual to be straightforward and responsible. Tr. at 46-47. He knows that he can rely on the Individual in the work environment. Tr. at 46.

E. Third Co-Worker

The third co-worker testified that he has known the Individual for 22 years. Tr. at 52. They socialize together occasionally. Tr. at 52. In addition, they commuted together for five or six years, alternating the driving responsibilities. Tr. at 53. The third co-worker believes the Individual to be very honest. Tr. at 54. He testified that the Individual is very reliable. Tr. at 54.

III. Standard of Review

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of proceeding, we apply a different standard, which is designed to protect national security interests. A hearing is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See *Dep’t of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the “clearly consistent with the interests of the national security test” for the granting of security clearances indicates that “security-clearance determinations should err, if they must, on the side of denials.”) *Dorfman v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issue. *Personnel Security Hearing*, Case No. VSO-0002 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate, or mitigate the allegations. *Personnel Security Hearings*, Case No. VSO-0005, *aff’d*, (1995). See 10 C.F.R. § 710.7(c).

IV. Findings and Conclusions

A. Criterion F

In evaluating a Criterion F case involving falsifications and omissions, I must consider factors such as whether the individual came forward voluntarily to renounce his falsifications or to admit to his omissions, the length of time of falsehood or omission was maintained compared to the length of time the individual has been honest, whether there is a pattern of falsifications or omission, and the amount of time that has transpired since

the individual's admission. See *Personnel Security Hearing*, Case No. TSO-0587 (2008), and cases cited therein.

In this case, I find that the Individual deliberately falsified and omitted relevant and material information on his July 2006 QNSP. He falsified information when he failed to indicate that a lien had been placed against his property. He omitted information when he failed to include his wage garnishments for failing to file and pay his state income taxes. The Individual testified that he did not intentionally falsify or omit the information on the QNSP. He testified that he forgot about the wage garnishment because it was not occurring in July 2006. He further testified that he did not know there was a lien placed against his property, because he did not understand the difference between a lien and wage garnishment.

I find little in the record to support mitigation of the Criterion F security concern. Weighing against restoring the Individual's access authorization is that the Individual maintained the falsifications and omissions for almost two years. His falsifications are recent, having occurred in 2006. He has now been honest with the DOE about these matters for only six months. Further, the Individual did not come forward on his own to report these falsifications or omissions. They were discovered during a background investigation. Finally, there is a pattern of the Individual deceiving the DOE. As noted in the Notification Letter, the Individual falsified information on his 1986 PSQ. He failed to indicate that he had ever been terminated from employment due to alcohol use, when he had in fact been terminated as a direct result of his use of alcohol. Also on the 1986 PSQ, he failed to admit that he had used marijuana only two years earlier. The falsifications in the 1986 PSQ support the 2006 QNSP falsifications and omissions in that they show a pattern of deception in completing DOE security forms. I, therefore, find that the Individual failed to mitigate the Criterion F security concerns.

However, I do not believe that the Individual falsified information during the PSI when he stated that he intended to call an attorney to assist him in filing his taxes. I believe that at the time of the PSI, that was the Individual's intention, although the record in this matter indicated that he failed to follow through on this matter until over six years later in 2008. Therefore, it is not, strictly speaking, a falsification. Nevertheless, this derogatory information does support a Criterion L concern, as it shows the Individual to be unreliable and untrustworthy. I will address this derogatory information under Criterion L.

B. Criterion L

The Individual admitted that he had not filed his federal or state taxes for ten years. He also admitted that he knew he was violating both federal and state law by not filing his taxes. Further, he admitted that he felt financially irresponsible because he had not filed his taxes. In addition, the Notification Letter raised the fact that the Individual asserted in

March 2002 that he intended to contact an attorney to assist him in filing his federal and state taxes. Yet as of May 2008, he had still not contacted a lawyer to assist him in filing his taxes. He did not contact a lawyer about his taxes until after he received the Notification Letter. He filed his federal and state tax returns shortly before the hearing. I believe the Individual's failure to follow through on his 2002 stated intention to contact an attorney to assist him in filing his taxes indicates he is unreliable. Also, I believe the Individual's continued violation of the law for ten years shows him to be unreliable. The continued violation of the law is aggravated by the fact that the Individual was aware that he was violating the law and assured the DOE that he would seek assistance for the problem. Such behavior is further evidence that the Individual is unreliable and not trustworthy. The only testimony he presented to explain his failure to file and pay his taxes was that he detested paperwork and procrastinated. This testimony does not resolve the security concern. Based on the foregoing, I find that the Individual has failed to mitigate the security concerns raised by Criterion L

V. Conclusion

As the foregoing indicates, the Individual has not resolved the Criteria F and L security concerns cited in the Notification Letter. Therefore, I must conclude that the Individual has not shown that restoring his access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Consequently, it is my decision that the Individual's access authorization should not be restored at this time. The parties may seek review of this decision by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: February 3, 2009